Highway Tort Liability and Risk Management

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Highway Tort Liability and Risk Management

I. Introduction: Accidents will happen, and many will happen on MHTC/MoDOT highways.

MHTC/MoDOT is one of the largest landowners in the state and is required to allow public access, 24-7, to its land so that the public may undertake what is a fairly dangerous activity (i.e. driving on the highway). What makes this especially dangerous is the number of individual drivers making numerous, independent decisions that affect the safety of everyone on the road.

Any accident, vehicle or otherwise, can have various and numerous causes. In addition, the damages and injuries suffered as a result of an accident can be equally various and numerous. Often, the true cause or causes of an accident and the extent of the resulting damages can be difficult to determine and can be the subject of debate.

The resulting ambiguities regarding causation and damages, along with an ever-present desire to seek compensation, are often what set the stage for litigation.

As a result of the shear amount of property owned by MHTC/MoDOT and the type of activities that take place on that property, MHTC/MoDOT will unfortunately always be the host to a large number of accidents, and for reasons to be discussed herein, this means MHTC/MoDOT will unfortunately always be involved in a large amount of litigation.

Although the exact amount of litigation and litigation-related exposure that MHTC/MoDOT will face in the future is difficult to determine, some exposure is inevitable and affirmative steps can be taken to limit that exposure. Today's presentation is intended to educate everyone as to the steps MHTC/MoDOT can and do take to try to contain this exposure.

A. General Concepts

Torts: A "tort" is a wrong committed, which harms another's person or property. Torts are divided into two basic classes: "Property Torts" which involve injury to the real or personal property or another; and "Personal Torts," which involve injuries to another person's body. The purpose of a lawsuit brought in tort is to compensate a party for its injury or loss (i.e. damages). Thus, if no injury or loss occurs, a lawsuit cannot be brought in tort. Someone who commits a tort is commonly referred to as a "tortfeasor." Note: Torts can also be classified into "intentional torts" (arson, assault, murder) and "negligent

torts" (resulting in unintentional injury), but for the purpose of our discussion today, we will only focus on negligent torts.

Five Elements of a Tort: Generally, a tort claim involves an accusation that the defendant breached a duty, causing injury to the plaintiff. However, within that simple sounding statement, there are actually five basic elements the plaintiff must prove in order to prevail on a tort claim.

1. Duty: The defendant had a legal duty to the plaintiff which required the defendant to do, or not do, something. MHTC/MoDOT owes a duty to the public to build and maintain roads that are "reasonably safe" when used as intended. Claiming someone failed to act when that person had no legal duty to act cannot be grounds for a lawsuit.

2. Breach of Duty: There was a breach of the duty. A failure by MHTC/MoDOT to build or maintain roads that are "reasonably safe" when used as intended would be a breach of our duty.

3. Causation: The breach of the duty was the "proximate cause" of the injury. Generally, the proximate cause means the "legal cause" or "general cause" rather than the actual or immediate cause. EXAMPLE: If someone is pushed off a building, the actual cause of their injury is hitting the ground, but the proximate cause is the push that knocked them off the building.

4. Allocation of Fault: Under the tort system used in Missouri, each proximate cause must be assigned a portion of fault for causing the injury. EXAMPLE: Someone gets pushed off a building, but the chain of events that caused the fall was one person being pushed into another, who then knocked into the defendant, sending the defendant over the edge of a building that was supposed to have a railing but didn't. –An allocation of fault may be that the initial pusher was 55% at fault, the person who was pushed is 5% at fault, and the building owner who did not maintain an adequate rail is 40% at fault. Under the right circumstances, the plaintiff can also be allocated a percentage of the fault (-such as if the plaintiff in the previous example was standing in a area that was clearly marked as dangerous or had been previously barricaded).

5. Injury: There must have been an identifiable injury. An injury can be a physical injury to a persons body, damages to a persons property, or some other kind of loss directly resulting from the breach of a duty. The purpose of a lawsuit is to obtain an award that will put the injured party back into the position that they were in prior to

the accident or to reimburse them for financial losses suffered because of the accident. If there is no injury to be compensated for, then a lawsuit serves no purpose. Also, the court tries to avoid ordering compensation for future injuries that cannot be confirmed or that are speculative.

Damages: The loss in value to any property, the injuries suffered by any person, and any other monetary losses resulting from an accident (note: we will not be discussing intentional acts). In order to facilitate an efficient system of exchange, damages are calculated to a specific dollar amount through the litigation process (injuries are typically calculated by considering the medical costs associated with the injury along with the pain and suffering incurred as a result of the injury).

Liability: The degree to which any one party is legally responsible for causing the loss of another and/or for compensating that other party for their loss.

Negligence: Failure to exercise the care that a reasonable and prudent person would exercise given the situation.

> **Reasonable**: Not extreme or excessive; rational; possessing sound judgment.
>
> **Prudent**: Able to govern and discipline oneself by the use of reason, or exercising caution as to danger or risk;

Note: An exact determination as to what constitutes negligence in any given situation has always been, and will always be a subject of debate because different people will have different opinions as to what is reasonable and prudent. However, it is important to remember that hindsight will almost always lean towards recognition of negligence rather than absolution of negligence because it is far easier to look backwards and say something was foreseeable than to actually look forward and foresee what is going to happen.

Notice: A person or entity either knew or should have known about some fact or condition (-such as the condition of a particular roadway). Notice also sometimes includes facts that a person or entity "could have known". Notice based on "should or could have known" arguments is commonly referred to as "constructive notice," as opposed to "actual notice."

Litigation: Generally speaking, the entire process through which one party (the plaintiff) attempts to recover damages from a second party (the defendant) via the legal system. There are various stages of litigation, and it is important to note that the onset of litigation

(or pre-litigation) can begin long before a lawsuit is actually filed with the court. Likewise, litigation can continue even after a trial has taken place (appeals, collections, etc.)

Money: This will come as a surprise to everyone, but money plays a very big role in lawsuits and litigation. The avowed purpose of any attorney working on behalf of a plaintiff in a lawsuit is to ensure his client is "fully compensated" for his/her/its loss, and this often means ensuring that the loss is assigned the highest dollar value possible and that those dollars can be collected from someone who actually has money.

"Deep Pockets" Theory: The legal strategy of trying to name as many wealthy defendants in a lawsuit as possible (-or at least one wealthy defendant). It is an exercise in futility to obtain a dollar judgment against a party who has no money and will never have any money. This, in and of itself, helps our employees from being sued in many lawsuits! At its most basic, our efficient system of exchange only works in dollars, and if someone has zero dollars, they are typically referred to as being "judgment proof." Therefore, if the party who is *mostly* responsible for causing a loss is judgment proof, a Plaintiff will often go after parties who may be deemed only *partly* responsible but have money. In addition, even if a primary Defendant is insured, the damages resulting from a car accident can often total more than the limits of an insurance policy, and thus, a second Defendant with Deep Pockets would be desirable. This theory explains how a lot of Defendants who may have questionable liability wind up being named in a lawsuit. –Unsurprisingly, MHTC/MoDOT wind up being named in a lot of lawsuits in which a negligent driver causes an accident but is uninsured or his/her insurance is insufficient to cover all of the Plaintiff's injuries and/or losses.

Fabricated Cases: Yes, they really do happen. People sometimes seek compensation for damages they didn't actually incur, and sometimes people seek compensation from defendants who did not actually cause their injuries or loss. Again, due to the sheer amount of property owned by MHTC/MoDOT and the type of activities that take place on that property, MHTC/MoDOT is in an unfortunate position when it comes to instances of fabricated damages and liability.

"Perception" of Truth: In reality, nearly all traffic accidents are caused, at least in part, by the actions of individual drivers. The national trend today is to call a traffic accident an "incident." Call it what you want, most incidents are not caused purposefully, so they are still "accidents"! Drivers come in all shapes, sizes, ages, degrees of awareness, attentiveness, awake-ness, drunkenness, unlicensed-ness, and just plain poor driving ability (-and don't forget cell phones; reaction times are 3X slower than normal). Very rarely can it be said that any particular accident would have occurred absent some driver error. However, this does not preclude a partial finding of fault (liability) regarding other

parties/Defendants, and often, injured parties will have various reasons for wanting to emphasize the liability of these secondary parties (-see Deep Pockets above). Regardless of the reason, MHTC/MoDOT often has to defend itself from attempts by Plaintiffs to over-emphasize MHTC/MoDOT's role in causing an accident. It is important to recognize these various motivations because ultimately, jury verdicts are not based upon *absolute* truth, but rather how the jury *perceives* the truth based on the two sides presented to them at trial.

Exposure to Risk: As described above, MHTC/MoDOT has significant exposure to risk (financial loss) due to its responsibility (and liability) for building and maintaining the state highway system. Therefore, MHTC/MoDOT will be named in many lawsuits, and MHTC/MoDOT must be prepared to defend itself against claims involving real liability (instances of actual fault; rare) as well as those involving fabricated or exaggerated liability.

Managing Risk: In order to avoid becoming a de facto insurer for the public at large, MHTC/MoDOT must vigorously defend itself in cases where its liability is being fabricated or exaggerated. Likewise, in order to avoid incurring unnecessary expenses and potential large dollar judgments, MHTC/MoDOT needs to be able to settle lawsuits and pay claims when appropriate. Effective Risk Management and properly implemented risk management techniques offer guidance in this area and help facilitate the proper handling of these claims.

B. Course Purpose and Content

Audience: This presentation has been prepared for you to provide a general overview of the legal and Risk Management needs and operations of MHTC/MoDOT.

Purpose: The purposes of this presentation is to:

1. Explain Tort Law, Legal Liability, and their impact on MHTC/MoDOT.

2. Inform everyone of MHTC/MoDOT's legal responsibilities to the public, and explain MHTC/MoDOT's vulnerability to roadway-related tort lawsuits.

3. Explain the relation between proper risk management techniques and litigation facing MHTC/MoDOT.

4. Encourage officials and employees to acknowledge and manage to minimize tort claims and financial losses from lawsuits by practicing effective risk management techniques.

II. Risk and Risk Control: Not that long ago, the concept of sovereign immunity prevented a plaintiff from suing MHTC/MoDOT for accidents occurring on its highways. In 1978, Missouri waived that sovereign immunity and allowed government entities like MHTC/MoDOT to be sued for a dangerous condition of its property or the negligent operation of a motor vehicle it owns. 537.600, RSMo. The following explains some of the risks associated with this waiver of sovereign immunity.

B. Types of Risks

Roadway Tort Liability: A roadway-related tort lawsuit results from a traffic accident in which one party (the Plaintiff) accuses another, the Defendant, of negligence. Since it is impossible to eliminate all traffic accidents (people are imperfect and accidents will happen), it is also impossible to prevent all roadway-related tort lawsuits. However, through proper risk management, MHTC/MoDOT can at least exert some control over its financial exposure to roadway-related liability.

Alleged Roadway Defects/Dangerous Conditions of the Road: MHTC/MoDOT can be named as a Defendant in a lawsuit under a claim that the roadway itself was somehow defective and caused an accident. The alleged dangerous condition could result from negligent design, construction, or maintenance.

Typical defects include:

Edge Drop Offs: Simply an un-level surface along the side of the road such that the edge of the lane or shoulder is several inches higher than the area adjoining it. Drivers who leave the roadway, for whatever reason, can claim that the drop-off caused them to lose control. Missouri courts have routinely found that MHTC/MoDOT's duty to the public, to provide roads that are reasonably safe when used as intended, includes maintaining roads that are safe when the use by drivers only slightly deviates from intended use, and a very common example is drivers who drift slightly out of their lane and onto the shoulder.

Slippery/Slick Roads: Though many states have provided their respective departments of transportation a "weather defense," relieving them of liability for accidents caused by the results of weather, Missouri does not have such a defense.

Thus, many lawsuits brought against MHTC/MoDOT arise out of accidents in which a driver loses control in bad weather. Our defense always incorporates the idea that if a driver simply drives slower in wet weather then they are less likely to lose control (-the phrase, "driving too fast for conditions" comes up a lot), but drivers nonetheless have had some success arguing that the condition of the road caused one section of road to be even more slick than the rest.

Fixed Objects Near Roadway (failure to provide a clear zone): One of the more surprising findings of liability against MHTC/MoDOT was the 1999 case *Martin v. MHTC* in which the Missouri Supreme Court found that MHTC/MoDOT was liable for death of a driver who lost control of her car on the highway, traveled 25 feet off the highway, and hit a tree that had been planted as part of a beautification project 30 years earlier. Though there was no question that the road itself was reasonably safe when used as intended, the Missouri Supreme Court found that MHTC/MoDOT could have anticipated cars would leave the roadway and would need a standard "clear zone" in which to stop.

Traffic Control Devices/Signing: Traffic control devices are used at locations that typically involve higher levels of traffic conflict, and thus, many accidents happen near traffic control device locations. Most lawsuits against MHTC/MoDOT involving traffic control devices usually involve malfunctioning devices (lights out/sign down) or an inadequate warning (device could not be seen from a far enough distance and no warning was given). Under the sovereign immunity waiver, MHTC/MoDOT must correct hazardous conditions within a reasonable time once we are put on notice, and thus, downed signs and malfunctioning traffic lights need to be addressed as quickly as possible. –And we have systems in place to allow for that level of response.

Work Zones: Accidents increase in work zones. This increase in accidents occurs for several reasons. Work zones often do not follow the design consistency of the road and have signing different from regular sections of the roadway. These differences conflict with driver expectancy. This means, it can be very easy for a potential Plaintiff to make a claim that MHTC/MoDOT is partially responsible for causing an accident that occurred in a work zone. However, it is important to remember that while work zones may conflict with a drivers' expectations, they do not render a driver incapable of safely operating his/her vehicle. Proper safeguards and adequate warnings can be used to put drivers in a position to make good decisions. Proper safeguards and adequate warnings can be determined by referencing MoDOT's standards, and although adherence to these standards will not guarantee complete safety in a work zone, it does mitigate the hazards to a great

extent. In addition, consistently adhering to these standards allows MHTC/MoDOT to later clearly explain its reasoning and it actions regarding the safety measures taken in any work zone, and in the event of a lawsuit resulting from an accident, this information can be used to show that a driver was in the position to make good decisions but failed to do so.

Fleet Vehicle Liability: MHTC/MoDOT can be named as a Defendant in a lawsuit under a claim that one of our employees caused an accident while driving a vehicle as part of his/her work-related duties. (-Will be discussed separately later).

B. "High-Risk" Accidents and Locations

"High Risk" Accidents and Locations: Not all accidents are equal. For the purposes of risk management and tort liability, some accidents are more likely to result in tort claims and present a larger of amount of exposure. The two factors that mainly determine exposure are the degree of damages (the overall dollar amount) and the degree of liability (MHTC/MoDOT's percentage of fault). So-called "serious" accidents (-not that they all aren't *serious* though) that result in severe injury or death are obviously going to present a greater degree of exposure.

Speed, Volume and Conflicts: This is not difficult to understand. High-speed, high-volume roads will generally have more accidents. Likewise, places where cars need to turn, interchange, or intersect will create more conflicts and accidents. Although these are general concerns, they can be used to predict areas with a greater potential for accidents, and this ability to predict areas of concern can directly effect future evaluation of what MHTC/MoDOT knew, should have known, or could have known. Likewise, knowing a particular area has a greater potential for accidents can also effect future evaluation of the degree of care a reasonable, prudent person should have exercised. (Again, hindsight will be a factor).

Prior Accidents at the Location: The existence of prior accidents at a particular location can also be used to show "notice" following an accident. Even if there was no detectible hazard regarding the roadway at the time of its design, construction, and subsequent maintenance, it can be argued that MHTC/MoDOT could or should have known about an alleged hazard based upon a disproportionate number of accidents at that location, or a disproportionate number of "serious" accidents. MoDOT/MHTC cannot be held liable for a dangerous condition that it did not, or should not, have known about. Therefore, it is

important that MHTC/MoDOT actively pursue the identification of such locations…which it does.

C. Hazard Identification and Reduction Programs

Pursuant to 23 U.S.C §152 (-USC = United States Code, a federal statute), MTHC/MoDOT has developed a number of programs to identify and remedy potential hazards on our roadways. These programs are coordinated statewide through the traffic department and include a lot of comparative analysis of all the uniform traffic incident reports entered into the TMS database. In addition, MHTC/MoDOT incorporates information obtained from the public, law enforcement, and information collected by MHTC/MoDOT personnel statewide.

D. Risk Management : Reality and Organizational Preparedness

Reality: Accidents Will Happen. It's true. No matter how well we design, construct, and maintain the roads, accidents will continue to happen, and whether we are at fault or not, we will be sued as a result of some of those accidents. We therefore need to be prepared to defend ourselves when we are improperly named in a lawsuit. Just remember this:

> *If you build it, they will come. When they come, they will wreck. When they wreck, they will sue.*

Despite our best efforts, we will make mistakes. You cannot build a roadway that will prevent all accidents from happening. There has never been, nor will there ever be, a centerline stripe that prevents a vehicle from crossing over to the opposing lane of traffic. In fact, vehicles have been known to vault concrete median barriers and land on vehicles in the opposing lanes of traffic under the right set of circumstances! Safety is a primary concern at every level of this organization, and we have structured our work at every level so that there are safeguards in place to insure that we provide the safest traveling environment possible. However, despite our efforts and the safeguards we use, accidents will still occur. Likewise, as an organization comprised of individuals, we do sometimes make mistakes, and we therefore need to be prepared to properly defend ourselves in the event that we make a mistake.

Organizational Preparedness: Can begin long before a lawsuit is filed. Managing the risks associated with the operation of our system can and should begin long before an accident has occurred. We should be prepared to defend ourselves against lawsuits, and part of the preparation means establishing routines which put us in the best position possible to defend ourselves when necessary.

III. Torts: Negligence and Liability

A. Overview

Liability and Responsibility: Liability and responsibility are essentially synonymous. When an individual (or entity) is liable for some activity, he/she/it is obligated by law to be responsible for that activity. If a responsible party fails to perform or improperly performs that activity, and the failure of improper performance results in property damage, injury (including death), or other economic loss, the responsible party may face legal action initiated by the "wronged" party.

B. Negligence

An accusation of negligence against MHTC/MoDOT essentially involves a claim that MHTC/MoDOT had a duty or obligation to do something (or sometimes, not do something), MHTC/MoDOT failed to do that thing (or not do that thing), and someone or someone's property got hurt as a result.

Duty: As discussed above, negligence is (generally) the failure to exercise the care that a reasonable and prudent person would exercise given the situation. However, this failure to act or act properly cannot be the subject of a lawsuit unless there was a *duty* on behalf the actor to take such action. An entity cannot be sued for failing to act when it had no duty to act.

Duty to Maintain Roads that are Reasonably Safe: Missouri courts have routinely found that MHTC/MoDOT's *duty* to the traveling public is to build and maintain roads that are reasonably safe when used as intended (or when use only deviates slightly there from). It is not our duty to provide roads that are *absolutely* safe in all circumstances, and we only need to ensure the roads are reasonably safe when drivers use the road as intended or when use deviates only slightly (we know people may speed a little, may cross over the shoulder line a bit, etc., and must plan accordingly). However, it is important to note that improper use of the road will not always absolve MHTC/MoDOT of liability if it can be shown that, despite the improper use, our failure to provide a reasonably safe roadway nonetheless contributed to the accident.

C. Comparative Fault v. Contributory Negligence

We previously discussed the idea of someone or some entity being *partially* responsible for an accident. How this concept is addressed within tort law is through the concepts of Comparative Fault or Contributory Negligence. As a prelude to these next few sections, it is important to note that the law is constantly evolving due to new legislation being passed and new judicial opinions being handed down. Below, I have tried to offer brief overviews of this process before describing the state of the law as it is today.

Contributory Negligence: Until the early 80's, Missouri and most other states applied an "all or nothing" method of determining whether an injured party would be allowed to recover for a negligent tort. If the injured party was not negligent, but the person who injured him was, then the injured party could recover. If the injured party was so negligent that he/she substantially caused his/her own injury, then he/she was considered to be "contributorily negligent," and when his/her contributory negligence was considered the *leading* cause of his/her own injuries, he/she was not permitted to recover from another negligent tortfeasor. In addition, if the injured party was not primarily responsible but was partially negligent and had the "last clear chance" to prevent the injury, then recovery was likewise barred.

Comparative Fault: If contributory negligence sounded confusing (or perhaps a tad unfair) that is because it was, and in 1983, the Missouri Supreme Court adopted the doctrine of "Comparative Fault." Comparative fault basically requires the jury to assign a percentage of fault for the injury to all the parties whom they deem responsible, including the plaintiff when appropriate, and the plaintiff may then recover only that percentage of the damages for which the jury found someone else liable (i.e., if the jury finds the plaintiff 30% responsible, the plaintiff can only recover 70% of his/her damages from the defendant(s)). Under this scheme, plaintiffs can be more at fault in causing the accident than the defendants, but still recover from those defendants.

D. Joint and Several Liability

Missouri has always followed the doctrine of Joint and Several Liability. The term "joint liability" simply means that where the acts of two or more persons or entities collectively caused the plaintiff's injuries, all are liable to the plaintiff in damages. "Several liability" means that even though more than one wrongdoer caused the injuries, the plaintiff does

not have to sue all of them; he/she could sue just one, and recover his/her damages from that one defendant.

Joint and Several Liability is a doctrine intended to benefit a wrongfully injured plaintiff. The idea is that a plaintiff that is wrongfully injured should not bear the burden of trying to collect his/her judgment from several different defendants (who may or may not have the money), and Defendant's claim that someone else is also *partially* responsible for an injury is not truly a defense to the Plaintiff's claim, but rather a new claim that the Defendant needs to bring against that other party. Most states do not apply this doctrine to its governmental entities. Missouri, however, does make governmental entities subject to the doctrine, thereby allowing tax dollars to pay for the negligence of other parties.

Until very recently, the doctrine of Joint and Several Liability combined with the doctrine of Comparative Fault posed a very serious financial risk to MHTC/MoDOT. Under Comparative Fault, MHTC/MoDOT can often be assigned a nominal percentage of fault in causing an accident (5%-10% compared to another Co-Defendant who is assigned 90%-95% of the fault). However, under pure Joint and Several Responsibility, a Plaintiff could then collect the entire amount of the judgment, up to the amounts of the statutory caps, from MHTC/MoDOT, leaving MHTC/MoDOT to then seek recovery from the other co-defendant. Such a regime was often used by plaintiffs' counsel to seek a greater recovery when the primary defendant was judgment proof or had only a limited ability to pay.

The New Tort Reform Act:

After years of losing ground to the plaintiffs' bar, the tort reform atmosphere changed dramatically in 2005. The Missouri legislature passed a tort reform bill that altered the effects of both comparative fault, as well as joint and several liability. (§537.067, RSMo). Under the new statute (applying to cases filed after August 28, 2005), a co-defendant will only be held jointly and severally liable if he/she is found to be at least 51% at fault. This means, any defendant who is found less than 51% at fault will only be liable to the Plaintiff for the percentage of the damages that is equal to that Defendant's percentage of fault. Therefore, under the new law, if MHTC/MoDOT is found to be only 5% at fault in causing an accident, then MHTC/MoDOT will only need to pay 5% of the overall damages. This new law should prevent the above-described scenario in which MHTC/MoDOT is named in a lawsuit merely because any assignment of fault (no matter how small) would allow for the plaintiffs to collect some money when the "real" defendant is judgment proof.

Mandatory Binding Arbitration: Arbitration is like an abbreviated trial in which most of the typical rules of evidence are disregarded and a selection of arbitrators (usually 3) decide that matter rather than a judge and jury.

Use of arbitration is an alternative means of resolving tort disputes, and in cases against MHTC/MoDOT, Plaintiffs may now request mandatory, binding arbitration in lieu of a trial pursuant to §226.095, RSMo. The Missouri Supreme Court held in Murray v. MHTC, 37 S.W.3d 228, that the Missouri Constitution does not require MHTC/MoDOT to consent to arbitration, as is the case with private individuals (including MHTC employees), and as a result, Plaintiffs can request an arbitration that will be definitive and binding to both parties in any case involving MHTC/MoDOT. MoDOT is the only state agency, or any governmental entity for that matter, affected by this law.

IV. Tort Actions against the MHTC, MoDOT, and the State.

Hey, It's Not All Doom and Gloom: There are several unique aspects to lawsuits that involve state entities, and for the most part, these unique caveats help to limit MHTC/MoDOT's exposure. In fact, MHTC does very well in the defense of tort lawsuits brought against it and its employees.

A. Sovereign Immunity

Sovereign Immunity is an absolute legal protection for state entities preventing them from being sued in a court of law; it not only prevents judgments against state entities, but prevents suits against state entities outright….So why are we here? –Because Sovereign Immunity no longer offers the absolute protection it once did.

1. History

Sovereign Immunity originates from old English law, under which the King could not be sued without his permission. Plaintiffs' attorneys will often claim that sovereign immunity was simply carried over from English common law, and that it's supposed underlying concept of "the King can do no wrong" is merely vestigial within the United States' common law. However, a counter argument could be made that under the United States' legal system, the state is the collective embodiment of the people, and just as this individual cannot sue himself, the people collectively cannot be held liable to themselves.

Regardless of how one views it philosophically, Sovereign Immunity barred suit against public entities in Missouri all the way until 1977 when the Missouri Supreme Court decided that it could and would change this longstanding area of common law. The Missouri Supreme Court held that Sovereign Immunity would be eliminated outright, but delayed its ruling from being put into effect for one year, just in case the state legislature wanted some time to address the issue.

Nearly immediately the state legislature passed a statute re-establishing Sovereign Immunity. However, under the new statute, the legislature carved out two exceptions, and these exceptions have arguably been growing in scope ever since.

2. Exceptions to Sovereign Immunity

The two exceptions carved out by the legislature are commonly referred to as the Fleet Liability exception, and the Dangerous Condition Exception.

The **Fleet Liability Exception** is pretty straightforward. Under this exception, MHTC/MoDOT can be liable for injuries directly resulting from negligent acts or omissions by MHTC/MoDOT employees arising out of the operation of motorized vehicles within the course of their employment. To sue MHTC/MoDOT for the negligent operation of a motor vehicle, the claimant must prove that:

1) The MoDOT employee was within the course of employment, and
2) A motorized vehicle was involved (the law pretty much covers anything that moves under the power of a motor, but does not include stationary equipment that is merely capable of being moved such as a stationary crane that is not in the process of being moved).

B. The Dangerous Condition Exception

The **Dangerous Condition Exception** to Sovereign Immunity is more complicated and allows for MHTC/MoDOT to be implicated in a much larger number of lawsuits.

Under this exception, Sovereign Immunity is waived for, "Injuries caused by the condition of a public entity's property if the plaintiff establishes that the property was in dangerous condition at the time of the injury, that the injury directly resulted from the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of harm of the kind of injury which was incurred, and that either a negligent or wrongful act or omission of an employee created the dangerous condition or public entity had actual or constructive notice of the dangerous condition in sufficient time prior to the injury to have taken measures to protect against the dangerous condition."

Translated into English, the Dangerous Condition Exception states that there are four conditions that need to be met in order for Sovereign Immunity to be waived in the case of an injury:

1. The property was in a dangerous condition at the time of the injury.
2. The injury directly resulted from the dangerous condition.
3. The dangerous condition created a reasonably foreseeable risk of harm of the kind of injury which occurred.
4. The Dangerous Condition was either created by a public employee in the course of his /her employment by a negligent or wrongful act OR the public entity had actual or constructive notice of the dangerous condition in sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

The first element, that the property was in a dangerous condition at the time of the injury, is relatively easy for a plaintiff to show: Usually, the courts are willing to accept the contention that if an injury was caused by a condition of the property, then that condition was dangerous. The courts make this element self-proving, though we would argue that more should be required.

The second element, that the injury directly resulted from the dangerous condition, is not as meaningful as it may seem. Missouri courts have routinely held that as long as the public property was in a dangerous condition and was partly responsible for causing the injury, then fault will be apportioned to the public entity along with the other defendants. Essentially, if the property is found to have been in a dangerous condition, the jury will decide what percentage of fault MHTC/MoDOT is responsible for. However, courts have been willing to recognize a "break" in causation in instances in which an intentional third-party criminal act caused an injury. Some examples of this are when a court refused to consider the lack of an adequate fence or sufficient parking lot lighting a "direct cause" of an assault and battery against a pedestrian outside a state prison (Kanagawa) and when the Missouri Supreme Court refused to consider the lack of a taller fence a "direct cause" of a drivers death when a young man dropped a large piece off concrete of a highway overpass (Dierker).

The third element, that the dangerous condition created a reasonably foreseeable risk of harm of the kind of injury which occurred, is pretty straightforward and is almost always present if an injury occurred, and the injury was even remotely related to an alleged dangerous condition of the property. In theory, there could be an injury that is such an unforeseeable result of an otherwise dangerous condition that this element would preclude the waiver of Sovereign Immunity, but we are yet to see one (cite Oldaker).

The fourth element, that the dangerous condition was either negligently created by an employee OR that MHTC/MoDOT had actual or constructive notice of the condition, can essentially be described as simply requiring notice of some kind. If a dangerous

condition is caused by the negligent action or omission of an employee, it can be fairly said that MHTC/MoDOT could or should have known about the condition, and therefore, either of these caveats can be boiled down to simply requiring actual or constructive notice. When it comes to discovering dangerous conditions not caused by an MHTC/MoDOT employee, some key factors to remember are "time" and "obviousness". The longer a dangerous condition has existed and the more obvious that dangerous conditions is, the more likely it is that a jury will find MHTC/MoDOT could or should have known about it. Typically, only conditions that have existed for a very brief period of time (somewhere between a couple of hours to one day) or that are virtually undetectable will fail to meet this element.

C. State of the Art Defense

Traditionally, there is a very solid defense to allegations concerning a dangerous condition of property. Of course, in Missouri, this defense is not as solid as it could be! In keeping with a great legal tradition, there is an exception to the Dangerous Condition exception to Sovereign Immunity. The general assembly included an additional defense within the Sovereign Immunity statute that said when a road was designed and constructed prior to September 12, 1977, and met the safety standards in existence at the time, then MHTC/MoDOT will have a complete defense to liability even if the plaintiff can show that by today's standards, the highway design is negligent or the construction was dangerous. Unfortunately, (for MHTC/MoDOT) this is another area where the courts have seemingly sought to interpret the statute in favor of finding liability, and the courts have routinely held that virtually any corrective action taken by MHTC/MoDOT constitutes a redesign of a road and thus its pre-1977 status is lost (see Donahue, 758 S.W.2d 50, and Cole, 770 S.W.2d 296, in which the courts found that the widening, changing of grades, resurfacing, or installation of lights or traffic control devices constitutes a re-designing of the road sufficient to override the pre-1977 defense).
-Despite the broadening interpretations of these exceptions, Sovereign Immunity still offers a valuable tool to MHTC/MoDOT and all other state entities in reducing their exposure to tort liability.

D. Statutory Damage Cap

Missouri Statutes also limit the amount of damages which can be recovered from MHTC/MoDOT. §537.610, RSMo. This protection is a very valuable protection to MHTC/MoDOT .

This statute controls the amount of money that a state entity can be held liable for as the result any accident or occurrence, no matter how badly a person is hurt, and no matter how many people hurt.

The original damage cap was established in 1978, and it limited the amount of money that could be paid by a state entity to $100,000 per claim or $1,000,000 per occurrence (-if there were multiple claims arising from the same incident).
In 1999, legislation was passed which increased the damage cap to $300,000 per claim and $2,000,000 per occurrence, with an annual adjustment to be made based on inflation. At this time, no other amendments were made to the tort statutes and the plaintiffs' bar gained an increasing advantage over MHTC.

Predictably, along with the possibility of more money, came more lawsuits. The number of lawsuits in which MHTC/MoDOT was named as a defendant has more than doubled since the caps were increased and the amount of money that MHTC/MoDOT paid out in lawsuits overall has increased four-fold and continues to climb!

Despite the increases, the damage caps still save MHTC/MoDOT millions of dollars a year in liability exposure, and prevent MHTC/MoDOT from
having the ultimate "deepest pockets."

E. Personal Liability

Personal Liability is of course always a subject of great concern to any MHTC/MoDOT employee.

It is important to note that Sovereign Immunity does not protect individuals, it only protects state and public entities. Protections are available for MoDOT employees, however, and some are discussed below.

1. Official Immunity and the Public Duty Doctrine

Sovereign Immunity protects state and government entities; it does not protect individuals. Individuals performing government work may be protected by the doctrine of "official immunity." "Sovereign immunity" and "official immunity" are distinct legal concepts. Sovereign immunity is meant to protect the government itself, while official immunity is meant to protect an individual public official. In order to be protected by official immunity, you must be a "public official." Lynn v. T.I.M.E.-D.C., Inc., 710 S.W.2d 359 (Mo. App. E.D. 1986), and see State ex rel. Barthelette v. Sanders, 756 S.W.2c 536, 538 (Mo. Banc 1988). MHTC/MoDOT employees with decision-making and supervisory authority meet this threshold requirement.

There is also a related doctrine to official immunity called the "public duty" doctrine, intended to protect primarily the lower-level public employees, which recognizes that public officers normally owe a duty only to the public in general, not specific individuals. Therefore, a breach of a public official's duty owed only to the general public will not allow an individual injured by that action to recover against the official. Green v. Denison, 738 S.W.2d 861,865 (Mo banc 1987), Norton v. Smith, 782 S.W.2d 775, 777 (Mo. App. E.D. 1987), and see State ex rel. Barthelette, above. The rationale behind the public duty doctrine is to protect modestly compensated public employees against multifarious claims, and to allow them to perform the task at hand without suffering inappropriate distractions. Norton v. Smith and Green v. Denison, above.

Simply because you are a state employee, that does not mean that you have official immunity, or are protected by the public duty doctrine, for everything that you do. When MHTC employees breach a duty that they have at law, for which they have no discretion, or a duty owed to individuals under law, or they fail to exercise care to avoid injury to particular individuals when that injury is foreseeable, they may be liable to suit for the resulting injury and a judgment against them.

Official immunity may shield from tort liability public officers acting within the scope of their authority. That doctrine exempts such public officers from liability for injuries arising from their discretionary acts or omissions, but imposes liability for torts committed when they act in a ministerial capacity. A "discretionary" act requires the exercise of reason in determining the means to an end, and discretion in determining now or whether an act should be done or a course pursued. Most supervisory acts are protected from suit as discretionary. A "ministerial" function, in contrast, is one of a clerical nature upon which a public officer is required to perform in a prescribed manner upon a given state of facts, in obedience to law, without regard to his own judgment or opinion concerning the propriety of the act performed. Whether an act can be characterized as discretionary depends upon the degree of reason and judgment required to make it; the determination of whether official immunity applies or not must be made on a case by case basis, weighing those factors plus the consequence of refusing to grant official immunity.

The public duty doctrine recognized that public officers normally owe a duty to the general public, not to individual. Therefore, breach of a duty owed to the general public will not support a suit by an individual injured by that act. However, the public official is liable to an individual for his failure to perform a ministerial duty imposed upon him by law or statute, when the law creates a duty to the person who is injured. And the Missouri Supreme Court in Denison added to the potential liability under the public duty doctrine

by holding that public officials may be required to avoid injury to particular persons when the injury is foreseeable and not mandatory in the line of their duty.

2. State Legal Defense Fund

Essentially, so long as you were doing your job and did not intend to hurt anyone, you are insured against a personal liability suit resulting from your work at MHTC/MoDOT.

The general assembly realizes that if its state employees have a fairly high exposure to suit and liability, without appropriate protection, they will leave the state government and work elsewhere where their uninsured exposure is not so great. Therefore, the legislature created the State Legal Expense Fund to give the vast majority of all state employees the protection they need from liability.

As state employees, if the court finds you have no official immunity or immunity under the public duty doctrine, you can be subject to suit. However, for the vast number of state employees, if you are sued, we will defend you without cost (but you always have the right to hire your own attorney if you wish). Also, if the court renders a judgment against you, the state will pay it from the State Legal Expense Fund at our direction, so you do not have to pay any of it yourself.

There are some potential exceptions to this rule granting coverage from the State Legal Expense Fund. The most obvious involve intentional or criminal misconduct by the state employee without justification, or the use of drugs or alcohol in the workplace or in a way that may endanger the safety or property of others.

If you have concerns about types of potential conduct or misconduct, and whether you will be covered if you engage in those activities, check with your supervisor, your regional counsel, or the chief counsel's office.

Remember, an employee who follows the law and department policies, and acts with due regard for the safety and well-being of the public, his fellow workers and him/herself, and then gets sued for an injury to another that he/she did not intentionally cause, should have no concerns. He/she will be represented by us without charge, and if he is found liable, his judgment will be paid from the State Legal Expense Fund.

F. Inverse Condemnation

Under the Missouri Constitution, the State of Missouri may condemn and take private property for public use so long as the state pays just compensation to the private

landowner. This is referred to as the power of Eminent Domain, and it is not really being covered in this presentation. However, a tort-like action called Inverse Condemnation can be initiated by a private landowner whenever he/she feels that his/her real property was damaged or its value diminished by the State or a state entity.

V. Litigation

A. Nature and Origin

1. Nature

Resolution of Conflicts: The United States system of government has selected courts as the primary means of resolving conflicts. Courts settle controversies between persons, and between persons and the state. The court is the judge, and the judge is the court. The terms are used interchangeably.

Function of the Courts: The basic function of the court is to apply law to the facts. The facts are determined by a jury, if one is used. If a jury is not used, the court also serves as the finder of facts.

Plaintiff versus Defendant: In any lawsuit there are two parties involved, the plaintiff and the defendant. The plaintiff makes the original complaint against the other party. The other party thus becomes the defendant. More than one defendant can be named in a case.

Dual Judicial System: The judicial system in the United States is a dual system consisting of both state courts and federal court. The state courts consist of supreme courts, intermediate courts of appeal, and trial courts. Small claims courts provide a forum for deciding controversies quickly and inexpensively. However, many successful litigants are unable to collect their judgments because decisions from the small claims court are not self-enforcing.

Understanding the Roles: A key to coping with litigation is understanding how the role of attorneys may differ from the roles of others. Many different kinds of jobs at MHTC/MoDOT require employees that are highly educated, have extensive experience or knowledge in a specified field, licensed to practice their respective professions, and/or

operate under a fairly clear codes of ethics that makes them ultimately responsible to the public and the public's safety.

The Attorney's Adversarial Role: While ultimately, the roles performed by attorneys should also lead to greater public safety over time, attorneys' primary duty is to their clients, and their obligations to society are met by a performing advocacy in accordance with their professional ethics. Attorneys represent their client's interest through adversarial roles, public debates, and work in the courtroom. That is to say, when the "truth" in any given situation is unclear, the adversarial approach asks that both sides present their positions and an independent third parties to assess wherein between the "truth" lies. Generally, most kinds of jobs do not require an employee who has been trained to approach a situation in an adversarial way, and these employees can be at a disadvantage when called to the courtroom and faced with lawyers trained to discredit them.

2. Origin

Statute of Limitations: The Statute of limitations is a legally imposed time limit for filing lawsuits, and after the time limit expires, it is no longer permissible to file a suit. The statute of limitations is set by law (typically 5-10 years), and the length of time provided changes depending on the nature of the suit. The time limit starts to run when the event giving rise to the lawsuit occurs or when damages to the potential plaintiff first become discoverable. The reason for having a statute of limitations is to prevent past events from being litigated far into the future when it is less likely there will be adequate evidence or witnesses to allow the court to accurately reconstruct the "truth." The statute of limitations serves the court's purpose in searching for the truth by forcing cases to be brought within a reasonable period.

Purpose of Pleadings: The purpose of pleadings in civil actions is to define the issues of the lawsuit. The plaintiff files with the clerk of the court a pleading (also called a petition or a complaint), and a copy is then served on the defendant(s) named in the pleading.

Summons: Along with a copy of the petition, each defendant is served with a Summons notifying the defendant of the date on which he/she is required to appear before the court, and the date by which he/she is required to file an Answer to the petition.

Answer: Within 30 days of receiving a Summons/Petition, each Defendant must file an Answer or a default judgment may be entered against that defendant. Within the Answer, a defendant must answer each allegation contained in the Petition by either admitting or denying that allegation. The purpose of the admit/deny portion is to separate those

matters that are at issue (in dispute) from those that are not. Facts/statements admitted by the defendant will be treated as true for the rest of the lawsuit. In addition to admissions/denials, an Answer should also include any affirmative defenses which, if proved, will defeat the plaintiff's claims or limit the plaintiff's action or award (-examples would be that the case was filed after the Statute of Limitations had run or that plaintiff's recovery, if any, will be limited by the Statutory Damage Cap). The Answer may also contain any claims the defendant has against the plaintiff (counterclaims), or claims a defendant may have against another co-defendant named in the Petition (cross-claims). If a defendant has a relevant claim against another entity not named in the Petition, the defendant will need to file its own Third Party Petition to bring that entity into the current lawsuit.

Summary Judgment: Many lawsuits are decided without a trial even though the pleadings create issues of fact. These decisions result from the use of a procedure known as summary judgment. This procedure was created to avoid trials when there no genuine issue as to any material fact in dispute (trials and juries are used only to decide disputed matters of fact; if the only issues in a case deal with disputes over the law itself or how the law applies, then arguments can simply be made directly to a judge and the judge can enter a ruling. (-Judges decide the law; juries decide facts).

B. Pre-Trial Discovery

Discovery: Once a Petition has been filed, and the Defendant has filed an Answer, the Discovery process begins. Discovery simply refers to a series of legal procedures over a undefined period of time in which both sides request and receive information from the other parties in a lawsuit or possibly from entities not a party to the lawsuit (via subpoena). Although there are several rules governing Discovery and defining what information may be discoverable, the purpose of Discovery generally is to allow for an organized and open exchange of information so that all parties may properly evaluate their case and prepare for trial. Often, a properly organized and effective exchange of information will lead to the resolution of a case without the need for a trial.

Examples of Discovery: Discovery can be as simple as submitting a list of clearly written, narrowly defined questions for a party to answer (Interrogatories) or a clearly written, narrowly defined list of documents for a party to provide (Request for Production of Documents). Discovery requests can also be more complex, such as requests for medical records, medical examination, or permission to examine a party's property. Discovery is intended to allow broad access to information so that all parties have the chance to discover whatever information may be important to their case; However, Discovery can nonetheless be limited to the extent that requests prove unnecessarily burdensome and

attorneys are expected to work out amongst themselves what the limits of discovery should be in any given case *before* turning to court to decide the matter for them.

Interrogatories: Interrogatories are questions given to an opposing party to answer at their own convenience though a 30 day time limit applies. A limited number of objections may be made stating why an answer does not need to be provided to a particular question, but typically, an attorney will have his/her client supply answers to the questions asked.

Documents: "Documents" includes writings, drawings, correspondence, memoranda, logs, diaries, e-mails, inspection sheets, maps, graphs and just about anything else recorded in letters, figures, or pictures, either on paper or on a computer.

Discovery Sanctions: If attorneys are not able to resolve discovery disputes amongst themselves, they may turn to the court (this should be a last resort), and the court will decide the matter and assign Discovery Sanctions at its discretion.

Failure to Respond: If information requested by the opposing party is not turned over, the court may ask the attorney to show cause for not responding. If insufficient cause is provided, the court has the power to hold the offending party in contempt for refusal to cooperate in the discovery process, and this could result in a jail term until the order is honored. (-Though this is rare; usually the threat of contempt will result in the production of the information).

Depositions: Depositions are essentially testimony that is given by a witness, under oath, outside of court, but that is recorded (in writing and possibly video) by a court reporter. The purpose of a deposition is to allow attorneys the opportunity to question a witness and to record the witness's statements prior to trial without having to take up the court's time. Typically, the deposition of any witness may be taken so long as that witness has some information pertinent and relevant to the matter at hand. The deposition generally will be conducted in an attorney's office before a court reporter who has the authority to swear in the witnesses. In the deposition, one party will orally ask questions to the other party's witnesses or experts. A word for word transcript is made and duly authenticated. If a deposition is being taken by the opposing party, a lawyer should be present to protect his/her client's interest, and to object to any questions that could not properly be admitted into court as evidence. A deposition is often used in court to impeach testimony if the witness's answers in court do not agree with the answers in his/her deposition.

23 U.S.C. § 409: Is a federal statute that was passed by the United States Congress as a companion statute to 23 U.S.C. §152, which was a statute that required state highway departments to begin to taking systematic steps to establish procedures for identifying and

remedying hazardous roadway conditions on the nation's highways in order to qualify for federal highway funding. Essentially, 23 U.S.C. §409 states that any information collected or compiled by a state highway department as part of its effort to identify and remedy roadway hazards pursuant to 23 U.S.C. §152 is protected from both the discovery process and admission into evidence at trial. The purpose of the statute is to encourage states to do the most thorough and accurate job possible to identify and remedy roadway hazards without fear that their efforts might then be used against them in a court (-which would be a serious deterrent towards collecting the information). Note: While this statute sounds great, it is constantly challenged, and its precise limits are still the subject of litigation.

C. Trial Preparation

Initial Litigation Activity: At the first notification of a lawsuit (even if an actual Petition hasn't been filed), an investigation and general preparation for trial should begin. For cases involving MHTC/MoDOT, the matter will initially be investigated by Risk Management , and a file will be prepared. Risk Management may or may not make a determination as to liability, and the matter may be referred to the legal department at that time (or if it is unclear whether a lawsuit will be filed, the file may be retained until such time as a Petition is filed). Regardless of whether a Petition has been filed, if a determination is made that liability exists, Risk Management or the Chief Counsel's Office will normally try to negotiate a reasonable settlement. If no settlement is possible, the collection of information from both the opposing party as well from within the organization should continue.

Accurate Information and Early Assessment: Good working relationship and clear communication between Risk Management , the Chief Counsel's Office, and the rest of the organization allows for an accurate assessment of the facts at an early stage in litigation. It is at this early stage that attorneys need to be assured of a reasonable chance of winning a case in order to avoid needlessly investing MHTC/MoDOT's time, energy, and money.

MoDOT Employee as a Witness: Once all the available information is gathered and a decision to move towards litigation is made, the next step in preparing for trial is selecting the necessary witnesses. There are typically two kinds of witnesses: Fact Witnesses and Expert Witnesses. Fact witnesses simply testify as to facts such as something they saw, heard, or recorded. MHTC/MoDOT employees may be used as fact witnesses when necessary, but often, it may be advantageous to use independent witnesses to establish facts. MHTC/MoDOT employees may also be asked to serve as Expert Witnesses, who often have a more involved role.

Expert Witnesses: Generally, an expert witness is needed if the jury's understanding on a complicated issue will be enhanced, and if general experience of an ordinary person is not sufficient. An expert is not needed if the jury can just as easily determine the answer to the question at issue on their own. An expert witness is one who has acquired by study or experience a special skill or superior knowledge in a particular field about which persons who do not have special training are incapable of forming an accurate opinion or of deducing correct conclusions. In different cases, MHTC/MoDOT may ask individuals from Design, Traffic, Maintenance, the Bridge Department, Right of Way, the Sign Shop, or just about any other department to serve as an expert witness if their expertise will assist the jury in understanding an area of knowledge that the average person would not normally be expected to understand. The weight that a jury will give to expert testimony will depend on the extent of the expert's education, skills, experience, and primarily, the basis of their opinions in drawing their conclusions.

Expert Witness Preparation: The expert witness should do his/her research well. Like attorneys, most of the time spent by an expert witness on the case will not be in the actual court room but in preparation. Often, a written report will be prepared which will form much of the basis for the attorney's defense. Because of the permanence of written information, words must be selected very carefully (words like *reasonable*, *never*, *absolutely*, and *definitely* should not be used lightly). To the extent possible, every avenue of information should be researched so full preparation is achieved.

Privileged Information: Privileged Information is information that is confidential between the attorney and his client and is protected from disclosure. Any communication between an attorney and his client, and even photographs taken during the investigation of an accident may be privileged, because photographs are considered a form of communication. Any information obtained from private, independent investigators is considered privileged.

D. Trial

Introduction: Many tort suits are either settled or die from lack of interest. Occasionally, the suit cannot be settled and the plaintiff pursues the case to trial.

Jury or Judge: Typically, juries are charged with deciding matters of fact (if two witnesses give opposing testimony as to some fact, the jury decides who to believe), and judges decide questions of law (such as whether or not Sovereign Immunity protects MHTC/MoDOT in a particular case). However, the law also allows for the parties to waive the jury and have a trial judge decide issues of fact as well. It is generally believed that jury

trials benefit Plaintiffs, and when the damage amount is high, juries are generally thought to be more sympathetic to injured parties.

MHTC/MoDOT Representative At Trial: Any government agency involved in a lawsuit has a right to designate a representative to sit through all of the proceedings just a if he/she were the party to the lawsuit. A party to a lawsuit has a right to be present during all parts of the proceedings. The representative chosen should be well informed regarding the matter being litigated and should be helpful during the trial. Representatives who also serve as witnesses may be exempt from the general rule that witnesses should be prohibited from hearing the testimony of other witnesses at trial.

Trial Outline and Presentation of the Evidence:

Jury Selection: Jury selection is very important to any trial strategy. However, it is also rather complicated. For the purposes of this presentation, it will suffice to say that a panel of potential jurors are brought the courthouse, and opposing attorneys go through an organized process in which each tries to select the jurors he/she think will side with his/her client and exclude the jurors who won't. When an attorney finishes questioning a jury panel, and he/she has no further objections to panel members, the attorney "passes the jury for cause".

Opening Statements: Each side initially makes opening statements to the jury at the beginning of the trial (plaintiffs go first, and the defendant may reserve his opening statement until the defense begins presenting its side of the case later in the trial). An opening statement is not evidence, but is used only to familiarize the jury with the essential facts in the case that each side expects to prove, so that the jury may understand the overall picture of the case and the relevance of each piece of evidence that will be presented.

Presentation of Evidence: After the opening statements, the plaintiff presents his evidence. Evidence is presented in court by means of examination of witnesses and the introduction of documents and other exhibits.

Direct Examination and Cross-Examination: In direct examination, the party that calls a witness questions him to establish particular facts about the case. After the party calling the witness has completed his direct examination, the other party is given the opportunity to cross-examine the same witness. Matters inquired into on cross-examination are not limited to those matters that were raised on direct examination, but must be relevant to the lawsuit.

Redirect Examination: After cross-examination, the party calling the witness has the opportunity of examining the witness again, and this second examination is called redirect examination. It is limited to the scope of those matters covered on cross-examination and is used to clarify matters raised on cross-examination.

Recross-examination: After a redirect examination, the opposing party is allowed to "recross-examine," with the corresponding limitation as to the scope of the questions. Redirect examination and recross-examination can continue as long as the court will allow. Once finished, the next witness is called to the stand.

"Rest": After the plaintiff has examined all of his/her witnesses, he/she "rests." Then, the defendant puts on his/her case going through the same process of direct examination, cross-examination, redirect examination, and "re-cross-examination" until all of his/her witnesses have testified.

"Close": Once the defendant is finished presenting, he/she also announces, "rest." If there are no rebuttal witnesses by either side, both parties announce "close," which means they are finished with the presentation of evidence.

Judgment Process:

Jury Instructions: When the presentation of evidence is finished, the jury is recessed and the judge and lawyers prepare instructions for the jury. There are standard jury instructions used in Missouri that differ depending on the type of case, and while attorneys may argue which instruction is the most appropriate, non-standard instructions will not be used unless good cause is shown.

Jury Deliberations: The jury then retires and considers their verdict. The jury is only required to make a determination of the facts of the case. Once a verdict is reached, it is signed by the jury and brought to the court. No more is required of the jury. The judge decides who is liable and who should or should not pay what amount. The jury does determine as a fact issue how much the damages are, although the judge decides the final award of judgment.

Possible Judicial Actions: The judge also has the right to declare a mistrial and discharge the jury. He/she can indicate that the jury's decisions are inappropriate and request that the jurors deliberate again. And the judge can declare judgment notwithstanding the verdict, disregard the jurors' decisions, and pass judgment himself/herself.

VI. Information Management and Documentation

A. Overview

Records: Clear and organized record keeping goes a long way towards putting this organization in a position to defend itself. A vast majority of the time, MHTC/MoDOT is not responsible for causing an accident, and well kept records will give us the evidence we need to prove we are not responsible. The difficulty with records is that you never know what is going to be important until after the fact. That is why each department has record-keeping procedures to help keep record-keeping tasks and expenses at a minimum while also preserving the largest amount of information possible.

B. Incidents and Responsibilities.

It is a simple matter to file a lawsuit, and no doubt, it appears to some that litigation has become a popular national pastime. Succeeding in defending a lawsuit is another matter, particularly when the government or one of its employees is the defendant. To help lessen the chance of losing a lawsuit, certain guidelines can be followed to collect and preserve information and bolster MHTC/MoDOT's defense against a potential lawsuit.

C. Contacting Attorneys and Risk Management

The Office of Risk Management (RI): Within MHTC/MoDOT, Risk Management is responsible for investigating accidents for which there is a potential for a lawsuit. Their personnel are trained to look for and collect pertinent data pertaining to accidents. They are well versed in taking statements from witnesses and photographing the accident site and in doing anything else which may be helpful in preparing a defense.

Working with Risk Management and the Chief Counsel's Office: Communication between Risk Management and the Chief Counsel's Office as well as within the rest of the organization is crucial in trial preparation. Not only do the Chief Counsel's Office and Risk Management need to be clear regarding what general and specific information each is seeking for each case, but clear two-way communication needs to be maintained so that the Chief Counsel's Office and Risk Management can accurately assess the information they are gathering. In addition, it is always important to consult with Risk Management and the Chief Counsel's Office regarding a matter that is either the subject of a lawsuit or is expected to the subject of a lawsuit because any information gathered independently, without the involvement of Risk Management or the Chief Counsel's Office, is discoverable by an opposing party in a lawsuit. However, information gathered at the

request of Risk Management or the Chief Counsel's Office in anticipation of litigation is not discoverable because it is considered "work product" which is the accumulation of a party's legal counsels' thoughts and analysis. (This bar to discovery may be overcome by a sufficient showing of need on the part of opposing counsel).

D. Preservation and Collection of Incident Information.

It is nearly impossible to know what information may later be pertinent to a lawsuit filed against MHTC/MoDOT. However, there are certain types of information that are more likely than others to wind up being helpful, and the respective records policies of different divisions are designed to help retain this information.

Risk Management also collects and preserves important information related to accidents on Missouri's highways. At the direction of the Chief Counsel's Office, Risk Management will create and supplement a file on any incident or location that MHTC/MoDOT has reason to suspect will be involved in a lawsuit. In this file, Risk Management will collect whatever pertinent records are available already, and then begin generating additional information/documents by contacting those individuals within the organization who may have such information. Again, it is important to maintain clear communication throughout this process not only to respond to information requests from RI but also to inform RI of any new situations which may merit their attention.

E. Procedures for Releasing Information.

Quotes and statements to the public or to private individuals can often be used in litigation against MHTC/MoDOT, and they can also be *misused* against MHTC/MoDOT and taken out of context. As a public entity, MHTC/MoDOT allows open access to most general information about our operations (guidelines, designs, manuals, etc.), but when dealing with specific topics that are related to some area of litigation or are likely to be related to some area of litigation (such as information about a specific location or maintenance operation), it is best to rely upon MHTC/MoDOT's own public relation's department, RI, or the CCO to relay information to the public and interested private parties. Remember an interested party can always submit a sunshine request in order to gather information, and that process is preferable because the accuracy of the information will be verified by the proper people within the organization.